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No. 37

CALMAR, INC., *Petitioner*,

v.

COOK CHEMICAL COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. On January 18, 1965, the Court granted certiorari in *Graham* v. *John Deere Co.*, No. 580. The *Graham* case involves the issue of patent validity, and presents the unique[1] situation of a square and admitted conflict of circuits as to the validity of a single patent.

[1] We know of no other petition for certiorari raising such a square conflict of circuits as to the validity of a single patent during the entire period from this Court's decision in the case of *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950) through the *Graham* petition itself.

See *Jeoffroy Manufacturing, Inc.* v. *Graham*, 219 F. 2d 511 (5th Cir. 1955), *cert. denied*, 350 U.S. 826 (1955); see *John Deere Co.* v. *Graham*, 333 F. 2d 529 (8th Cir. 1964).

The grant of the writ of certiorari in the *Graham* case, we submit, underscores the need for the Court also to grant certiorari in a case, like the present one, which vividly illustrates the debasement of the standard of patentability. For the present case—unlike *Graham*—involves a holding by the court below that a patent on a trivial gadget was valid. As we demonstrate extensively in our Petition (pp. 9-15) it is the recurrent abuse of the standard of patentability by the Courts of Appeals, sanctioning patents on devices of the nature of the one involved here, that causes the situation which this Court must correct.[2]

2. The paradox to be found between the decision of the Court of Appeals for the Eighth Circuit in this case and the decision of an entirely different panel of that court in the *Graham* case emphasizes the nature of this Court's task on review in this area. In both cases, the decisions make all the appropriate references to the decisions of this Court; and the Brief in Opposition dwells on the point (pp. 9-13) that the court below in this case paid verbal respect to the standards laid down by the decisions of this Court through the case of *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950).

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[2] The Brief in Opposition does not deny this decisional trend, but simply makes the assertion that heretofore it has not extended to the Eighth Circuit (p. 9). But certainly this Court's supervision over the standard of patentability is equally called for, without regard to whether the particular lower court in question has itself frequently or infrequently deviated from the proper standard.

But the vital difference is that the *Graham* panel applied those standards in practice,[3] not simply verbally. On the other hand, even the most cursory reading of the two opinions indicates that the panel of the Eighth Circuit which sat in the present case applied in practice an entirely different standard of patentability from that applied in the *Graham* case.[4] As we pointed out in our Petition for Certiorari (pp. 10-13), the standard of patentability embraced in the Constitution can be as effectively watered down by a pattern of adjudication—ostensibly on the basis of determinations of fact—which has the practical effect of causing that standard to be debased, as through express assertions that this Court's decisions through 1950 do not state the law any longer. Certainly the certiorari jurisdiction exists to prevent such a practical debasement of Constitutional standards through repeated misapplication. As *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500 (1957) teaches, "special and important reasons for the grant of certiorari . . . are certainly present" where lower federal courts "persistently" misapply the governing standard. (*Id.*, at 510) In such an area, certiorari should be granted to "correct instances of improper administration" of the standard and thus "prevent its erosion." (*Id.*, at 509)

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[3] The *Graham* panel recognized—as the Court below did not—that: "The public is a silent but an important and interested party in all patent litigation, and is entitled to protection against the monopolization of what is not lawfully patentable." See 333 F. 2d, at 535.

[4] We also submit that a reading of the two opinions will indicate that the Graham patent was not a "gadget" patent as the one for the bottle cap in question here most assuredly was.

The need for supervisory review—so pressing in this area, as we have developed in the Petition—cannot be discharged simply through the grant of certiorari in a case involving a unique and atypical situation, such as the *Graham* case.[5] Rather, the Court should also take in hand the root of the problem, by granting certiorari in a case—like this one—which represents the nadir in sanctioning patents on petty gadgets.

3. Inasmuch as the Court has granted certiorari in the *Graham* case, and will thus finally be hearing argument on a question of patent validity, we urge it to grant certiorari in this case and thus afford itself a broader look at the application of the standard of patentability than can be provided by a single case—particularly one, like *Graham,* involving a comparatively technical and complex art. To this end we respectfully suggest that the Court consider hearing argument on our case together with that in the *Graham* case.[6] As we develop in the Petition, the patent at

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[5] The *Graham* case obviously involves a patent in a much more complex art than the one at bar—one in which there is much more likely to be patentable invention than in the fashioning of bottle caps. Should the Court affirm the judgment of the Court of Appeals in *Graham,* it is highly doubtful whether, in the light of the patent there involved, any meaningful guidance will be furnished to the lower courts with respect to the patenting of gadgets—where, as we have demonstrated, the real problem exists. On the other hand, should the Court reverse the judgment in the *Graham* case, and deny certiorari in this case, the Courts of Appeals might well be reinforced in the sanctioning of patents on gadgets such as the one involved in this case.

[6] In our case, the record has been printed for the Court of Appeals; accordingly, this case could be ready on the Court's docket at an early date.

bar—one on a household gadget—is one which lends itself to the drawing of an object lesson for the Courts of Appeals. This factor is not present in the *Graham* case.

Moreover, as we develop in our Petition, this case affords an example—which the *Graham* case does not—of the growing substitution of "commercial success," or commercial innovation, for invention, which is being countenanced by the Courts of Appeals. Despite the unconvincing apology of the respondent for this unmistakable tone in the opinion of the Court of Appeals (Br. in Opp., pp. 18-20), it is perfectly evident that the court below relied heavily on this factor.

Indeed, the entire Statement of Facts in the Brief in Opposition gives the point away by abandoning any effort to justify the Scoggin patent in terms of the prior patented art which we extensively discuss in our Petition (pp. 4-8), and by discussing the Scoggin device solely in terms of the commercial history of the gadgets involved.[1] (See Br. in Opp., pp. 3-7; see also

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[1] In passing, we must say that that history is not very accurately stated: For example, it is simply not so, as suggested by the Brief in Opposition, p. 7, n. 3, that the Calmar device found to be infringing was a "copy" of the Scoggin device. Rather, it employed an entirely different kind of seal from the admittedly imperfect sort of seal employed by Scoggin. See Pet., pp. 7-8. And Scoggin's rearrangement of the prior art devices only involved the seal. It was only through an extravagant application of the "doctrine of equivalents" of *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U.S. 605 (1950) that the court below found infringement. Moreover, among other things, the Brief in Opposition ignores the fact that the ultimate solution to the "problem" of liquid insecticide sprayers was not simply in preventing the liquid from getting out of the cap but in preventing it from getting out of the bottle. This was Calmar's aim in the development of its

pp. 14-15). That reliance must be placed exclusively upon such factors in defense of the patent at bar[8] underscores the point we make in the Petition; that the real basis for the decision below was not the presence of an invention in the bottle cap shown in respondent's patent, but the "commercial success"—dubious enough in its own terms[9]—which the Court of Appeals found respondent's sprayer to have enjoyed.

The presence of this factor—completely foreign to the opinion of the other panel of the Eighth Circuit in the *Graham* case—is a further reason why this Court should grant certiorari in the case at bar, to afford itself a more comprehensive view of the last fourteen years' application of the standard of patentability in

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sprayer; this aim was achieved in Calmar's SS-40, and then belatedly adopted by respondent in its Bakan 3 sprayer. (Pet., pp. 7-8)

Respondent also belabors at length that last resort in patent cases, the "presumption of validity" attaching to the Patent Office's action in granting the patent. (Br. in Opp., pp. 3, 16-17, 21) But here the Patent Office's apparent basis for the grant of the Scoggin patent—the space between the lower edge of the hold-down cap and the container cap—was repudiated by the District Court as "not new or novel" and "not a part of the invention." (Pet., App. E., p. 25a)

[8] Contrast the approach of the *Graham* panel of the Eighth Circuit in applying the classic test of making an analysis of the prior patent art and, in the light of that analysis, examining whether the making of the combination in question involved the exercise of "inventive genius." See 333 F. 2d, at 531-34. It is this difference in approach which is the most fundamental difference between the approach of the *Graham* panel and that of the panel which sat below.

[9] See Pet., p. 18, n. 22; p. 20, n. 25.

practice, than can be afforded by review simply of the *Graham* case.[10]

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this Reply Brief, the Petition for Certiorari should be granted. As noted, we also respectfully suggest that the Court might wish to hear argument on this case together with argument on the *Graham* case.

Respectfully submitted,

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[10] As we suggested in the Petition, antitrust problems in the patent area are greatly compounded by low standards in issuing and judicially reviewing patents. (Pet., p. 15) This Court recently evidenced its continuing concern over antitrust-patent problems by granting review of two more cases in this area. *United States* v. *Huck Mfg. Co.*, No. 538, probable jurisdiction noted, January 18, 1965; *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, No. 602, cert. granted, January 18, 1965. Once again, we strongly suggest that even a more direct way of attacking the problems in this area is through a full resumption of supervision of the application of the standard of partentability in the Courts of Appeals.